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No. 387

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

PAN AMERICAN PETROLEUM CORPORATION, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR REHEARING BY PETITIONER

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May, 1964

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Petitioner prays that this Court grant rehearing of its order of May 4, 1964, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Tenth Circuit in the above-entitled case (No. 7002 below) as prayed for in the petition filed August 19, 1963, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. As set forth in the Petition, the issue in the instant case is whether orders of the Federal Power Commission promulgating "general" rules under the Natural Gas Act, 15 U.S.C. §§ 717-717w, are reviewable by "direct" petitions for review under Section 19(b) of that Act and upon the record in the Commission's rule-making proceeding. The Tenth Circuit held there can be no such "direct" review under this Act, and that the doctrine of "direct" review of agency rule-making orders set forth in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), is not applicable.

2. On April 20, 1964, in the companion case styled *Federal Power Commission* v. *Texaco Inc., et al.*, No. 386, This Term, this Court held that its holdings as to administrative agency rule-making hearing requirements set forth in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), *are* applicable to rule-making proceedings under the Natural Gas Act. In so doing, this Court reversed the decision of the Tenth Circuit in the companion case below (No. 7303). However, on May 4, 1964, this Court denied the Petition in the instant case, and thus left standing the holding below in the instant case which is inconsistent with the doctrine of "reviewability" of general rules set forth in *Storer*. Specifically, contrary to the holding below as to "reviewability," this Court held in *Storer* that "direct" review of an agency rule of substantive effect upon the "rule-making" record is appropriate, and as shown by the Petition in the instant case, there are no significant differences between the review pro-

visions of the Natural Gas Act here involved and the Communications Act before this Court in *Storer*.

3. The instant case thus is now vitally affected by this Court's decision of April 20, 1964, in the companion case No. 386, and by the forthcoming remand in No. 386. This Court in No. 386 left unresolved the issue of "reasonableness" of Commission rules in their application to specific types of contract clauses, which also has not yet been considered by the Tenth Circuit. As set forth in the "Petition for Rehearing by Respondent Pan American Petroleum Corporation" filed in No. 386, upon remand of No. 386 to the Tenth Circuit, this and other undecided issues should be considered and decided by the Tenth Circuit. However, resolution of such issues there inevitably will involve the question of what is the appropriate record for such review of the Commission's general orders, particularly when the issue of "reasonableness" is considered. Accordingly, Petitioner respectfully submits that prior to consideration of such issues by the Tenth Circuit or any other court,[1] this Court should resolve the issue of reviewability of a general order under Section 19(b) of the Natural Gas Act, and the issue of whether the proper vehicle for judicial review *is* the record developed by the Commission in its rule-making proceedings.

4. Unless the Petition in the instant case is granted, this Court's decision and forthcoming remand in No. 386 will leave constructions of the Natural Gas Act in most curious legal and practical anomolies—the *Storer*

[1] See "Motion of Texaco Inc. for Order Perfecting Proper Venue on Remand and Brief In Support of Motion" filed May 11, 1964, by Texaco Inc. in No. 386.

holdings are held applicable for one purpose and to one phase of "rule-making" in No. 386, but the decision below that the *Storer* holdings do not apply as to "reviewability" will be left standing in the instant case. Further, the critical importance of the "reviewability" issue is increased by the decision in No. 386 and current and future use by the Commission of rule-making procedures discussed therein. Upon remand in No. 386, and in the future, the reviewability and record issues in the instant case inevitably will arise again and again because the matters at issue in current Commission rule-making proceedings affect not only regulated entities, but all participants in such proceedings.

5. In the light of this Court's decision in No. 386, particularly the discussion of the *Storer* case therein, and the necessity for formulating an appropriate remand in No. 386, Petitioner therefore respectfully submits that the Court should reconsider its denial of the Petition in the instant case. Under *Storer*, "rules" of the Federal Communications Commission are directly reviewable on the record in the rule-making proceeding, and the same considerations apply to "rules" of the Interstate Commerce Commission (*American Trucking Associations, Inc.* v. *United States*, 344 U.S. 298 (1953)). The reasons for availability of such direct review are equally applicable to Federal Power Commission proceedings under the Natural Gas Act, and the instant case provides the most appropriate vehicle for such a decision by this Court. Now, because of this Court's decision in No. 386, all pending and future proceedings involving "general" rules promulgated in administration of the Natural Gas Act are and will be affected by the reviewability issues ripe for decision in the instant case.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, Petitioner respectfully urges that rehearing be granted and that upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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May, 1964

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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